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## BEFORE THE POSTAL REGULATORY COMMISSION WASHINGTON, D.C. 20268-0001

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COMPLAINT OF GAMEFLY, INC.	)	Docket No. C2009-1
	)	

MOTION OF GAMEFLY, INC., FOR LEAVE TO RESPOND TO MARCH 14 USPS OPPOSITION TO MARCH 7 GAMEFLY MOTION (March 18, 2013)

Pursuant to Rule 3001.21(b), GameFly, Inc, ("GameFly") respectfully requests leave to respond to the March 14 opposition of the Postal Service to GameFly's March 7 motion for adoption of standards and procedures to govern this remanded proceeding. GameFly has separately lodged its Response with the Commission. Although the Commission's rules do not authorize a response to a reply as a matter of right, 39 C.F.R. § 3001.21(b) allows the Commission or presiding officer to accept such a pleading as a matter of discretion in appropriate cases. Good cause exists for allowing GameFly to file such a response here.

In its opposition, the Postal Service effectively asks the Commission to reopen for relitigation virtually all of the major issues in the case. The Postal Service proposes to relitigate the Commission's detailed factual findings in Order No. 718 on every basic element of a discrimination case under 39 U.S.C. § 403(c), even though the Postal Service failed to seek judicial review of any of these findings within the jurisdictional deadline for doing so. And the Postal Service seeks to relitigate—or disregard—the

Court of Appeals' holding in GameFly, Inc. v. PRC, 704 F.3d 145, 148-149 (D.C. Cir.

2013), that the cost, operational and other differences between letter- and flat-shaped

DVD mailers are irrelevant to the task of choosing a remedy because GameFly's

"choice" to use flats is an involuntary one, compelled by the Postal Service's unlawful

discrimination in processing letters.

GameFly believes that the Postal Service's extraordinary and unprecedented

position is foreclosed by fundamental principles of issue preclusion, finality and repose

that are "as important when an issue has been determined by an administrative tribunal

as when it has been determined by a court." Restatement (2nd) of Judgments § 83

(comment b). We believe that a brief summary of the relevant principles, and brief

responses to some of the Postal Service's factual inaccuracies, would be helpful to the

Commission and fair to GameFly.

Respectfully submitted,

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March 18, 2013

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